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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

STEVE KASSAB, Plaintiff and Respondent, v. ROBERT FOYTACK, Defendant and Appellant.	D042583 (Super. Ct. No. GIC744855)

APPEAL from a judgment of the Superior Court of San Diego County, William C. Pate, Judge. Affirmed.

Defendant Robert Foytack appeals a default judgment entered against him, contending the trial court improperly denied his motion to quash service of summons and to dismiss the action on the ground of extrinsic fraud. He contends plaintiff Steve Kassab never served him with the summons and complaint and returned a false proof of service, and the trial court erred by finding his motion was subject to a timeliness requirement under Code of Civil Procedure[1] section 473.5. Although a motion to set a side a default

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1 Statutory references are to the Code of Civil Procedure unless otherwise specified.

judgment resulting from extrinsic fraud may be brought at any time, and section 473.5 is inapplicable to such a motion, we affirm the judgment as the court reasonably decided against Foytack on the conflicting factual issue of whether he was served.

BACKGROUND

In March 2000 Kassab sued Foytack for legal malpractice and related causes of action. A proof of service was filed showing personal service on Foytack by a third party on March 30, 2000. Foytack did not answer, and on May 23, 2000, Kassab filed a request for entry of default against him. Kassab served a copy of that document on Foytack by mail. The clerk of court entered the default on May 30, 2000.[2]

The complaint also named Lillian Godone-Maresca as a defendant, and a default was also entered against her. She successfully moved for relief from default and answered. Trial proceeded against her, and in February 2001 the jury returned a verdict finding she committed malpractice, but Kassab suffered no damages as a result. The trial court then denied Kassab's request for a default judgment against Foytack on the ground "the entry of a default judgment against a defaulted defendant is improper where an answering defendant has established non-liability."

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2 Foytack asserts that Kassab filed two different proofs of service, one showing substituted service and another showing personal service. However, we have augmented the record to include the superior court file (Cal. Rules of Court, rule 12(a)(1)(A)) and it does not support Foytack's assertion. Kassab first filed a proof of service, signed by a third party, in which there was no indication whether Foytack was served personally or through another person. After the clerk of court denied his first request for entry of default, based on that omission and other problems with the proof of service, Kassab filed a corrected copy of the original proof of service.

Kassab appealed, and on June 19, 2002, this court issued an opinion holding, among other things, that he was entitled to a prove-up hearing to establish his damages, if any, against Foytack. We determined the trial court's reasoning was incorrect because Foytack and Godone-Maresca "were not jointly and severally liable," and her successful defense "did not exonerate Foytack." (*Kassab v. Godone-Maresca* (Aug. 22, 2002, D037988) [nonpub. opn.].) We remanded the matter to the trial court for further proceedings. (*Id.* at p. 14.)

On August 9, 2002, Foytack moved to quash service of summons and dismiss the action under section 583.420, subdivision (a)(1) on the ground he was never served with the summons and complaint. Foytack submitted a declaration that stated he was never personally served, and he lived alone and had no office or employees so "there was no substitute service." Foytack accused Kassab of "falsely claiming he served me in this action when, in fact, he did not."

In his memorandum of points and authorities, Kassab stated he "has been unable to contact the process server due to the length of time that has passed," and he had thus "been prejudiced from the delay." In a declaration filed previously, Kassab stated: "On March 30th 2000, I paid a person, who is not a party to this matter, Tino Rosales, $30.00 . . . after he served . . . Foytack and . . . Godone-Maresca, a copy of the summons and complaint in person at their offices." Foytack submitted a supplemental declaration again denying he was ever served and accusing Kassab of filing a fraudulent return of service.

At a December 2002 hearing the court denied Foytack's motion, finding dismissal under section 583.420, subdivision (a)(1) was unavailable because Kassab "has not

delayed in prosecution of [the] action," and in any event, the motion was not brought within a reasonable time under section 473.5. The court noted Foytack did not move for relief until more than two years after the default was entered, and he did not deny receiving written notice of the entry of default and having actual notice of it. After a subsequent prove-up hearing the court entered a default judgment against Foytack for $10,200.

DISCUSSION

I

Foytack contends the court erred by relying on the time limitations of section 473.5, because his motion for relief from the default was based on extrinsic fraud—Kassab's alleged return of a false proof of service.

A motion for relief from default under section 473.5 must be brought "within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered." (*Id.*, subd. (a).) Section 473.5, however, "applies only to persons on whom service was made or attempted who did not have actual notice of the action." (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 222, p. 726; *In re Marriage of Smith* (1982) 135 Cal.App.3d 543, 555.) A defendant may move for relief under section 473.5 "*if the court has acquired jurisdiction*, i.e., the summons has been served, but service of summons has not resulted in actual notice." (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 40, italics added.)

In contrast, "a judgment is void for lack of jurisdiction of the person where there is no proper service of process on or appearance by a party to the proceedings." (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1016.) "Where a judgment is obtained by a false return of service, the court has inherent power to set it aside. In that case, the action is not brought under [section] 473.5." (8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 222, p. 726; *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444; *David B. v. Superior Court, supra,* at p. 1019; *Rogers v. Silverman* (1989) 216 Cal.App.3d 114, 1120-1126; *City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 730.) A "judgment [may] be attacked *at any time* either by motion or in an independent action in equity on the ground that it was secured by extrinsic fraud." (*Sullivan v. Sullivan* (1967) 256 Cal.App.2d 301, 304, italics added; *Washko v. Stewart* (1941) 44 Cal.App.2d 311, 317-318.)

However, the trial court's reliance on section 473.5 does not merit reversal because it found against Foytack on the service issue. "[T]he question of whether personal service of the summons and complaint was made on the defendant as shown by the return attached to the summons was one of fact for the trial court" (*Rackov v. Rackov* (1958) 164 Cal.App.2d 566, 570), and its "determination is binding on an appellate court if supported by substantial evidence." (*Crescendo Corp. v. Shelted, Inc., supra,* 267 Cal.App.2d 209, 212.)

Foytack argued he was entitled to dismissal because Kassab filed his complaint in March 2000 and as of August 2002, when he filed his motion for relief from the default, he had not been served with the summons and complaint. Section 583.420, subdivision

(a)(1) prohibits the court from dismissing an action for delay in prosecution unless "[s]ervice is not made within two years after the action is commenced against the defendant." In its minutes, the court quoted that language and found dismissal improper because Kassab "has not delayed in prosecution of this action." Although the minutes do not expressly address the service issue, to find no delay in prosecution the court necessarily found Foytack was properly served. "[I]t is settled that: 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Further, at the hearing the court stated Foytack "does come under the *jurisdiction* of this court and is in default." (Italics added.)

The court explained that particularly since Foytack was an attorney, his silence for more than two years after being served with a copy of the request for default "causes the court to substantially question his credibility on [the service] issue." "The credibility of the testimony offered by the parties is properly determined by the trier of fact, and its determination is binding on an appellate court if supported by substantial evidence." (*Crescendo Corp. v. Shelted, Inc.* (1968) 267 Cal.App.2d 209, 212.) " 'Our role as an appellate court is not that of fact finder; that is the role of the trial court.' [Citation.] The role of the appellate court is not to second-guess the trial judge. Reading a typed reporter's transcript does not enable us to view the witnesses, determine credibility or

determine which conflicting evidence is to be given greater weight." (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 493-494.)

We conclude the court's ruling is supported by substantial evidence. Accordingly, Foytack was not entitled to relief from default because the sole premise of his motion, lack of personal service, was unfounded.[3]

II

We do not reach Foytack's assertion that a small claims case Kassab brought against him is "res judicata" and requires reversal of the default judgment. The trial court denied Foytack's request that it take judicial notice of the small claims file because he "failed to provide the Court with copies of the materials requested to be noticed, [and] did [not] . . . properly specify the part of the court files sought to be judicially noticed." On appeal, Foytack attached copies of the judgment and other documents in the small claims action to his opening brief, and requested that we augment the record to include them. We granted the request, but Kassab failed to advise us the materials were not before the trial court. The appellate record may be augmented with records included in the original superior court file. (Cal. Rules of Court, rule 12(a)(1)(A).) In any event, the records

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3 Alternatively, Foytack contends that because "the alleged service was made by an individual who was not a registered California process server," Kassab "is not entitled to the presumption afforded by Evidence Code section 647." That statute provides the "return of a process server registered pursuant to . . . the Business and Professions Code upon process or notice establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return." (Evid. Code, § 647.) However, there is no suggestion the court applied the presumption.

show the small claims case was not adjudicated, but was dismissed because of the pendency of this action.

Foytack also contends the court erred by denying his motion because he had no notice as to the amount of damages Kassab sought, and the summons did not notify him he was being sued as an individual. However, Foytack waived these issues by not presenting them to the trial court. (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340; *Royster v. Montanez* (1982) 134 Cal.App.3d 362, 367.)

III

Kassab seeks sanctions against Foytack on the ground the appeal is frivolous. (§ 907.) *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650, the court adopted alternative tests for determining when an appeal is frivolous. "The first test is subjective: Was the appeal prosecuted solely for an improper motive, such as to harass the respondent or delay the effect of an adverse judgment? [Citation.] . . . [¶] The second strand of *Flaherty* is objective: Was the appeal so indisputably without merit that any reasonable attorney would agree it was totally devoid of merit?" (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1766, 1773.) We conclude neither test is met and do not award sanctions.

DISPOSITION

The judgment is affirmed. Kassab is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.